

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of) Case No.: **14-J-03436-LMA**
)
JAMES DARRYL IVEY,) **DECISION AND ORDER OF**
) **INVOLUNTARY INACTIVE**
Member No. 154832,) **ENROLLMENT**
)
A Member of the State Bar.)

On March 7, 2014, respondent James Darryl Ivey was ordered by the United States Patent and Trademark Office (USPTO) to be disciplined upon findings that he had committed professional misconduct in that jurisdiction. As a result, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding on July 7, 2014. (Bus. & Prof. Code, § 6049.1; Rules Proc. of State Bar, rules 5.350-5.354.)

The issues in this proceeding are limited to: (1) the degree of discipline to be imposed upon respondent in California; (2) whether, as a matter of law, respondent’s culpability in the USPTO proceeding would not warrant the imposition of discipline in California under the laws or rules applicable in California at the time of respondent’s misconduct in the USPTO; and (3) whether the USPTO proceeding lacked fundamental constitutional protection. (Section 6049.1, subdivision (b).)

Respondent bears the burden of establishing that the conduct for which he was disciplined by the USPTO would not warrant the imposition of discipline in California and/or

that the USPTO proceedings lacked fundamental constitutional protection. Unless respondent establishes one or both of these, the record of discipline in the USPTO proceeding is conclusive evidence of respondent's culpability of misconduct in California. (Section 6049.1, subdivisions (a) & (b).)

Respondent failed to participate either in person or through counsel, and his default was entered. The State Bar filed a petition for disbarment under rule 5.85 of the Rules of Procedure of the State Bar.¹ Rule 5.85 provides the procedure to follow when an attorney fails to participate in a disciplinary proceeding after receiving adequate notice and opportunity. The rule provides that if an attorney's default is entered for failing to respond to the notice of disciplinary charges (NDC), and the attorney fails to have the default set aside or vacated within 90 days, the State Bar will file a petition requesting the court to recommend the attorney's disbarment.²

In the instant case, the court concludes that the requirements of rule 5.85 have been satisfied, and therefore, grants the petition and recommends that respondent be disbarred from the practice of law.

FINDINGS AND CONCLUSIONS

Respondent was admitted to practice law in this state on December 16, 1991, and has been a member since then.

Procedural Requirements Have Been Satisfied

On July 7, 2014, the State Bar properly filed and served an NDC on respondent by certified mail, return receipt requested, at his membership records address (official address). The NDC notified respondent that his failure to participate in the proceeding would result in a

¹ Unless otherwise indicated, all references to rules are to this source.

² If the court determines that any due process requirements are not satisfied, including adequate notice to the attorney, it must deny the petition for disbarment and take other appropriate action to ensure that the matter is promptly resolved. (Rule 5.85(E)(2).)

disbarment recommendation. (Rule 5.41.) The return receipt, which appears to have been signed by respondent, shows delivery on July 11, 2014. A courtesy copy of the NDC sent to his official address on July 7, 2014, was not returned as undeliverable.

The State Bar made efforts to locate and contact respondent, including (1) contacting the Office of Probation of the State Bar to obtain other contact information for respondent but there was no other information than what the State Bar already had; (2) sending an email and a voicemail to respondent's State Bar membership records email address and telephone number (official email address and telephone number, respectively) on July 29, 2014. The voicemail and email informed respondent about the instant matter and the State Bar's intention to file a motion for entry of default if he did not file a response to the NDC on or before August 1, 2014. A copy of the NDC was attached to the email. There was no response to the voicemail or the email; and (3) Locating an additional telephone listing for respondent on July 31, 2014 and leaving a voicemail informing respondent about the instant matter and the State Bar's intention to file a motion for entry of default if he did not file a response to the NDC on or before August 1, 2014. There was no response to this voicemail.

Respondent failed to file a response to the NDC. On August 4, 2014, the State Bar filed and properly served a motion for entry of respondent's default. The motion complied with all the requirements for a default, including a supporting declaration of reasonable diligence by the State Bar deputy trial counsel declaring the additional steps taken to provide notice to respondent. (Rule 5.80.) The motion also notified respondent that if he did not timely move to set aside his default, the court would recommend his disbarment. Respondent did not file a response to the motion, and his default was entered on August 20, 2014. The order entering the default was served on respondent at his membership records address by certified mail, return receipt requested. The return receipt, which bears an illegible signature, shows delivery on

August 21, 2014. The court also ordered respondent's involuntary inactive enrollment as a member of the State Bar under Business and Professions Code section 6007, subdivision (e), effective three days after service of the order, and he has remained inactively enrolled since that time.

Respondent also did not seek to have his default set aside or vacated. (Rule 5.83(C)(1) [attorney has 90 days to file motion to set aside default].) On November 25, 2014, the State Bar filed the petition for disbarment. As required by rule 5.85(A), the State Bar reported in the petition that: (1) it had one contact with respondent since the default was entered.

On October 3, 2014, respondent sent the State Bar an email stating that he had just received the State Bar's July 29, 2014 email which contained a copy of the NDC. He stated that he fell out of compliance with probation for financial reasons and assumed that he would default into a two-year suspension. On that same date, the State Bar replied to the email, informing respondent that his case had defaulted, which could lead to disbarment, and advising him to review rules 5.80-5.85, Rules Proc. of State Bar, to ascertain the steps he may want to take. There was no further communication from respondent; (2) respondent has no other disciplinary matters pending; (3) respondent has one prior record of discipline; and (4) the Client Security Fund has not made payments resulting from respondent's conduct. Respondent did not respond to the petition for disbarment or move to set aside or vacate the default. The case was submitted for decision on December 23, 2014.

Respondent has one prior disciplinary record.

Pursuant to a Supreme Court order filed on July 24, 2013, respondent was suspended for two years, the execution of which was stayed, and she was placed on probation for two years, on conditions. Respondent was found culpable of violating rule 3-110(A) (not performing legal services with competence) of the State Bar Rules of Professional Conduct and sections 6068,

subdivisions (i) and (m) (not cooperating in a disciplinary investigation and not communicating with a client, respectively).

The Admitted Factual Allegations Warrant the Imposition of Discipline

Upon entry of respondent's default, the factual allegations in the NDC are deemed admitted and no further proof is required to establish the truth of such facts. (Rule 5.82.) Section 6049.1(a) provides, in pertinent part, that a certified copy of a final order by any court of record of any state of the United States, determining that a member of the State Bar committed professional misconduct in that jurisdiction shall be conclusive evidence that, subject to limited exceptions, the member is culpable of professional conduct in this state.

The court finds, as a matter of law, that respondent's culpability pursuant to 37 C.F.R. §§ 10.23(a) and (b); 10.23(c)(8); 10.77(c); and 10.89(c) in the USPTO proceeding would warrant the imposition of discipline in California under the laws or rules applicable in this State at the time of respondent's misconduct in the USPTO proceeding, as follows.

(Rule 3-110(A) [Failure to Perform Legal Services with Competence])

By repeatedly not responding to USPTO communications received on behalf of his clients, respondent willfully violated rule 3-110(A), which provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(Rule 3-700(A)(2) [Improper Withdrawal from Employment])

By abandoning his clients' patent applications without their knowledge or consent, respondent willfully violated rule 3-700(A)(2), which prohibits an attorney from withdrawing from employment until the attorney has taken reasonable steps to avoid reasonably foreseeable prejudice to the client's rights, including giving due notice to the client, allowing time for the employment of other counsel, and complying with rule 3-700(D) and other applicable rules and laws.

(§ 6068, subd. (m) [Failure to Communicate])

By not informing his clients about certain notices; not communicating with them about USPTO communications; and not responding to his clients' various attempts to communicate with him, respondent willfully violated section 6068, subdivision (m), which provides that an attorney has a duty to promptly respond to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

Disbarment is Recommended under the Rules of Procedure

Based on the above, the court concludes that the requirements of rule 5.85(E) have been satisfied, and respondent's disbarment must be recommended. In particular:

(1) the NDC was properly served on respondent under rule 5.25;

(2) reasonable diligence was used to locate and notify respondent of the proceedings prior to the entry of his default, including: (a) contacting the Office of Probation of the State Bar to obtain other contact information for respondent but there was no other information than what the State Bar already had; (b) sending an email and a voicemail to respondent's official email address and telephone number on July 29, 2014, informing him about the instant matter and the State Bar's intention to file a motion for entry of default if he did not file a response to the NDC on or before August 1, 2014. A copy of the NDC was attached to the email. There was no response to the voicemail or the email; and (c) Locating an additional telephone listing for respondent on July 31, 2014 and leaving a voicemail informing respondent about the instant matter and the State Bar's intention to file a motion for entry of default if he did not file a response to the NDC on or before August 1, 2014. There was no response to this voicemail;

(3) the default was properly entered under rule 5.80; and

(4) the factual allegations in the NDC deemed admitted by the entry of the default support a finding that respondent violated a statute, rule, or court order that would warrant the imposition of discipline.

Despite adequate notice and opportunity, respondent failed to participate in this disciplinary proceeding. As set forth in the Rules of Procedure of the State Bar, the court recommends disbarment.

RECOMMENDATIONS

Disbarment

The court recommends that respondent James Darryl Ivey be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys.

California Rules of Court, Rule 9.20

The court also recommends that respondent be ordered to comply with the requirements of California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding.

Costs

The court further recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that James Darryl Ivey, State Bar number 154832, be involuntarily enrolled

as an inactive member of the State Bar of California, effective three calendar days after the service of this decision and order. (Rule 5.111(D).)

Dated: February _____, 2015

LUCY M. ARMENDARIZ
Judge of the State Bar Court